No. 94-22

In the Supreme Court of the United States

OCTOBER TERM, 1994

DIANE WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the *Feres* doctrine bars a naval reservist's suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, alleging that she contracted the HIV virus because the Navy, which was aware that the naval petty officer from whom she acquired the virus was infected, had negligently failed to order him to inform potential sex partners of his HIV-positive status.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Anderson v. *United States*, 724 F.2d 608 (8th Cir. 1983)	7
Applehans v. *United States*, 877 F.2d 309 (4th Cir. 1989)	6
Deutsch v. *Flannery*, 823 F.2d 1361 (9th Cir. 1987)	5
Feres v. *United States*, 340 U.S. 135 (1950)	2, 5, 6
Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 (1982)	5
Mattos v. *United States*, 412 F.2d 793 (9th Cir. 1969)	7
Peck v. *Commissioner*, 904 F.2d 525 (9th Cir. 1990)	5
Persons v. *United States*, 925 F.2d 292 (9th Cir. 1991)	6
Sidley v. *United States Dep't of Navy*, 861 F.2d 988 (6th Cir. 1988)	6
Stencel Aero Eng'g Corp. v. *United States*, 431 U.S. 666 (1977)	6
United States v. *Brown*, 348 U.S. 110 (19540	6
United States v. *Carroll*, 369 F.2d 618 (8th Cir 1966)	7
United States v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980)	5
United States v. *Joseph*, 33 M.J. 960 (N.-M.C.M.R. 1991), aff'd, 37 M.J. 392 (1993)	3
United States v. *Shearer*, 473 U.S. 52 (1985)	3, 5

Satutes:

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*	3, 4, 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18), is unpublished, but the decision is noted at 12 F.3d 1111 (Table). The opinion of the district court (Pet. App. A19-A20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1993. A petition for rehearing was denied on February 7, 1994. Pet. App. A41-A42. The petition for a writ of certiorari was filed on May 9, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a naval reservist, tested positive for the HIV virus after she had sexual relations with a naval petty officer. Petitioner filed suit against the United States, alleging that the Navy had negligently failed to order the petty officer to inform potential sex partners of his HIV-positive status. The district court ruled that petitioner was precluded from relitigating her claim because the district court had ruled in an earlier case that her claim is barred by *Feres* v. *United States*, 340 U.S. 135 (1950), and dismissed the suit. Pet. App. A19-A20; A36-A37. The court of appeals affirmed. *Id.* at A1-A18.

1. Petitioner is a member of the United States Naval Reserve who worked part-time for the Navy as a journalist. She met petty officer John Joseph in December, 1988, when they worked in the same naval office. On January 22, 1989, petitioner and Joseph engaged in sexual intercourse at Joseph's off-base apartment. This was the only time petitioner had intercourse with Joseph. Pet. App. A2-A3.

Petitioner learned in July, 1989, that she had tested positive for the HIV virus during her annual screening by the Navy. She had not had intercourse with anyone besides Joseph since her last test, which had been negative. Petitioner was ordered by the Naval reserves to disclose her HIV-positive status to all potential sex partners. Pet. App. A3.

Joseph had tested positive for the HIV virus in a Navy test approximately a year before he met petitioner. Joseph received medical evaluations and counseling regarding his HIV-positive status, but he was not ordered by the Navy to disclose his HIV-positive status to potential sex partners. Joseph thus knew of his HIV-

positive status at the time he had intercourse with petitioner, but he withheld the information. Petitioner alleges that she would not have had intercourse with Joseph if she had known of his HIV-positive status. Pet. App. A3-A4.

The Navy's investigation also revealed that in November, 1988, Joseph's wife had reported to his commanding officer that Joseph was "pursuing sexual liaisons with other women without telling them he was carrying the AIDS virus." Pet. App. A5. The commanding officer spoke to Joseph about the allegation, but Joseph denied wrongdoing and the commanding officer did not pursue the matter further. *Ibid.*

As a result of the investigation requested by petitioner, Joseph was court-martialed. Joseph was convicted of aggravated assault for infecting petitioner with the HIV virus. *United States* v. *Joseph*, 33 M.J. 960 (N.-M.C.M.R. 1991), aff'd, 37 M.J. 392 (1993). Pet. App. A5. Petitioner filed an unsuccessful administrative claim with the Navy to recover for the injuries Joseph caused her. Pet. 15.

2. Petitioner filed suit in the United States District Court for the Southern District of California under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging that she contracted the HIV virus as a result of the Navy's negligent failure to order Joseph to inform potential sex partners of his HIV-positive status. Pet. App. A6. The district court dismissed petitioner's suit under the *Feres* doctrine, as developed in *United States* v. *Shearer*, 473 U.S. 52 (1985), because the suit would have required the court to second-guess military command. See *Washington* v. *United States*, No. 91-0301 GT(IEG) (S.D. Cal. July 10, 1991), attached as App., *infra*, 1a-3a; see also Pet. App. A6. The court also ruled that, even if the *Feres* doctrine did not apply, petitioner

would have no cause of action under the FTCA because petitioner had not established that the United States had any duty under California law to restrain the sexual behavior of its employees. App., *infra*, 2a-3a.

Petitioner did not appeal that ruling, but instead filed *pro se* a "virtually identical" second complaint. Pet. App. A6. She added the Secretary of the Navy as a defendant and added new allegations concerning the non-service connected nature of her injury and the Navy's safe sex policy. *Id.* at A6-A7.

The government filed a motion to dismiss. The district court granted the motion with respect to the Secretary of the Navy. The court initially refused to dismiss the suit with regard to the United States, stating that petitioner might have a valid claim against the government under the FTCA. Pet. App. A7-A8. After petitioner retained counsel, however, the district court granted the government's second motion to dismiss, explaining that, although it had "wanted to make sure that [petitioner] had every opportunity to get her allegations before the court," the dismissal of the first suit on *Feres* grounds constituted "the law of the case." Pet. App. A8-A9, A36-A37.

3. The court of appeals affirmed. Pet. App. A1-A18. The court of appeals noted that the Navy urged affirmance because petitioner was bound, under principles of estoppel, by the district court's ruling in her first case that her claim was barred under *Feres*, and because petitioner did not, in any event, have a meritorious claim under the FTCA. *Id.* at A11 & n.6; see Gov't C.A. Br. 11-16; 21-43. The court of appeals declined to address these issues. Pet. App. A17-A18.

On the merits of the *Feres* question the court found that the negligence alleged by petitioner, *i.e.*, the failure to issue an appropriate military order to Joseph, impli-

cates the need to protect the military disciplinary structure from judicial second-guessing, which is one of the rationales underlying the *Feres* doctrine. Pet. App. A13. The court held that petitioner's claim was barred by the *Feres* doctrine as elaborated in *United States* v. *Shearer*, 473 U.S. 52 (1985).

ARGUMENT

1. Petitioner seeks review of three questions concerning the applicability of *Feres* v. *United States*, 340 U.S. 135 (1950), to her case. Pet. i-ii. The doctrine of issue preclusion or collateral estoppel, however, bars petitioner from relitigating the *Feres* issue. In her earlier lawsuit, the district court decided that *Feres* barred petitioner's claim. App., *infra*, 1a-2a. If petitioner wanted to challenge that ruling, the proper avenue for relief was for her to have sought appellate review at that time. Petitioner did not appeal; thus, the district court's first ~~first~~ ruling, in a case in which the *Feres* issue was litigated and determined, is conclusive in petitioner's second suit, which presented a "virtually identical" claim. Pet. App. A6-A7. See *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 n.6 (1982); *Peck* v. *Commissioner*, 904 F.2d 525, 527 (9th Cir. 1990), quoting *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980); *Deutsch* v. *Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987).[1] The *Feres* issue that petitioner seeks to raise can have no bearing on the

[1] The district court also ruled in the first suit that, as a matter of law, petitioner had "no cause of action under the Federal Tort Claims Act" under applicable California law. App., *infra*, 2a. That ruling would preclude petitioner from relitigating her FTCA claim against respondent even if *Feres* did not apply.

outcome of the case and therefore is not properly presented for review.[2]

2. Petitioner's contention that *Feres* should not apply because this case involves public health issues is incorrect. The *Feres* decision, which addressed three consolidated cases, held that military service members may not sue the government under the FTCA for medical malpractice, see 340 U.S. at 137, and the courts of appeals have frequently applied *Feres* to bar FTCA claims alleging negligent provision of health-related services to service members. See, *e.g.*, *Persons* v. *United States*, 925 F.2d 292 (9th Cir. 1991); *Appelhans* v. *United States*, 877 F.2d 309 (4th Cir. 1989); *Sidley* v. *United States Dep't of Navy*, 861 F.2d 988 (6th Cir. 1988).

Petitioner also asserts (Pet. 40) that "[t]he fact that she had or has some connection to the military because of being in the reserves is irrelevant" and contends that she should be permitted to sue as if she were not a member of the military. The *Feres* doctrine is not applied to bar suits by persons who are not members of the military. See, *e.g.*, *United States* v. *Brown*, 348 U.S. 110 (1954). *Feres* may apply, however, to suits brought by reservists or members of other military services who are not on full-time active duty, where the alleged injuries "arise out of or are in the course of activity incident to service." 340 U.S. at 146; see, *e.g.*, *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666 (1977)

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[2] Collateral estoppel was raised by the United States as a defense in both the district court and the court of appeals. See Pet. App. A7-A9, A11 & n.6, A17-A18. The district court expressly noted that the ruling in petitioner's first lawsuit that the *Feres* doctrine barred petitioner's claim had not been appealed and therefore constituted "the law of the case". Pet. App. A6-A9; *id.* at A37.

(National Guard member); *Anderson* v. *United States*, 724 F.2d 608, 610 (8th Cir. 1983) (reservist); *Mattos* v. *United States*, 412 F.2d 793, 794 (9th Cir. 1969) (per curiam) (reservist); *United States* v. *Carroll*, 369 F.2d 618, 620 (8th Cir. 1966) (reservist). In her first suit, the district court noted petitioner's reserve status and held that her action was "barred under the *Feres* doctrine." App., *infra*, 1a. The district court's decision in petitioner's second suit to bar her from relitigating this issue in the circumstances of this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1994

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No. 91-0301 GT(IEG)

DIANE WASHINGTON, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

ORDER

Defendant's motion to dismiss came on for hearing July 8, 1991 at 10:30 a.m. Plaintiff was represented by James C. Knight, Esq. Defendant was represented by Paul J. Boudreaux of the Department of Justice. Having considered the pleadings and arguments in favor and in opposition, the court grants the motion to dismiss for lack of subject matter jurisdiction.

Plaintiff's action is barred under the *Feres* doctrine. The Supreme Court has stated that the United States Government is not liable under the Federal Tort Claims Act "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service". *Feres v. United States*, 340 U.S. 135, 146 (1950).

Plaintiff, while not on active duty, was a reservist and as such has the same status as an enlisted woman

under the *Feres* doctrine. *Mattos v. United States*, 274 F. Supp. 38 (E.D. Cal. 1967), aff'd 412 F.2d 793 (9th Cir. 1969). However, unlike the injuries in *Mattos*, plaintiff's injuries were not received incident to military service.

Nevertheless, the circumstances of this case are similar to *United States v. Shearer* 473 U.S. 52 (1985). In that case, an off-duty serviceman murdered another off-duty serviceman. The estate of one sued the military alleging that they were negligent in their discipline, supervision and control of the murderer. The court held that even though both men were off-duty, the suit nonetheless was barred as it would call into question "basic choices about the discipline, supervision and control of a serviceman". *Shearer* at 58. To do so would be to contravene one of the basic principles of the *Feres* doctrine, as "*Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty". The litigation in *Shearer* would have required the court to second-guess the military command. The same is true of plaintiff's case.

Even if plaintiff's action were not barred by the *Feres* doctrine as developed in *Shearer*, plaintiff has no cause of action under the Federal Tort Claims Act. The act grants the court jurisdiction for tort claims against the United States "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place

where the act or omission occurred." 28 U.S.C. §1346(b) (emphasis added). In this case, the court must look to California law as it would apply to a private employer, and whether that employer would have a duty to restrain or influence in any way the sexual behavior of its employees (in this case, Petty Officer Joseph).

Plaintiff presents no case which establishes such a duty. Under California law, an employer has been held not liable for the sexual misconduct of an employee outside the scope of employment. *Jeffrey E. v. Central Baptist Church* 197 Cal. App. 3d 718 (1988).

Plaintiff argues that violation of a rule promulgated by a private entity may be evidence of negligence, citing *Hartford Accident and Indemnity Company v. Bank of America* 220 Cal.App.2d 545 (1963). That case is not controlling given the circumstances leading to plaintiff's injury. Plaintiff must show a legal duty of a private employer which arises from a voluntary policy to somehow instruct or warn employees as to "safe-sex". Plaintiff has not directed the court to a case establishing a duty out of such a gratuitous undertaking, and the court has been unable to locate such a case. A duty arising to a third person out of a gratuitous undertaking is particularly tenuous.

The case is dismissed without prejudice.

IT IS SO ORDERED.

Dated: July 10, 1991 /s/ *Gordon Thompson, Jr.*
GORDON THOMPSON, JR.
United States District
Judge